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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 610

NORFOLK AND WESTERN RAILROAD COMPANY,
Appellant,

vs.

STATE OF NORTH CAROLINA ON RELATION OF A. J. MAXWELL, COMMISSIONER OF REVENUE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

A. A. F. SEAWELL,
Counsel for Appellee.

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STATE OF NORTH CAROLINA ON RELATION OF A. J. MAXWELL, COMMISSIONER OF REVENUE,
Appellee.

STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT.

The appellee respectfully presents the following matters and grounds making against the jurisdiction of the Court to entertain this appeal:

I.

(a) The cause of the plaintiff in error here, in the court below defendant in the statutory designation of the action but virtually actor or plaintiff, rested wholly in the ascertainment of fact to be established by evidence.

The facts necessary to a determination of the controversy were found by a court of competent jurisdiction, according

to the practice and procedure established in such court, under due process of law.

This Court will not review the findings of fact in the court below, or review a case determined in the State Court upon questions of fact properly determined.

Campau v. *Lewis,* 3 Wall. 106, 18 L. Ed. 211;
Hall v. *Jordan,* 15 Wall. 393, 21 L. Ed. 72;
Clipper Mining Co. v. *Land Co.,* 194 U. S. 220, 48 L. Ed. 944;
Smiley v. *Kansas,* 196 U. S. 447, 49 L. Ed. 546;
Waters Pierce Oil Co. v. *Texas,* 212 U. S. 86, 53 L. Ed. 417.

(b) This appellant, upon which rested the burden of proof in the court below to establish its claim, failed to introduce essential evidence in support thereof.

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S. 113, 65 L. Ed. 165.

(c) This case does not come within any of the exceptions under which this Court might relax the rule that it will not review the evidence and facts found, because:

1. The facts found by the trial court were supported by evidence.

2. The plaintiff in error here, having the burden of establishing its claim in the court below, and failing to introduce evidence for such purpose, cannot complain that the facts found by the trial court, relating to the net income of the defendant, were not supported by evidence.

Appellee begs to refer briefly to the proceedings brought in question in this appeal, and to call attention to assertions made in the Statement of Jurisdiction and Points Relied Upon, which are contradicted by the record and, therefore, do not serve to aid or invoke the jurisdiction of this Court.

History of the Case and Pertinent Statutes Governing Proceeding.

The appellant is a Railroad Company doing business in several States, including North Carolina. The Company was required by the North Carolina Revenue Act, Section 312, Chapter 80, Public Laws 1927, and Section 312, Chapter 345, Public Laws 1929, hereafter quoted (see appendix), to make certain returns or reports to the Commissioner of Revenue as a basis for the assessment of the income tax, according to the provisions of the statute. The pertinent part of that statute applicable to appellant, is as follows:

> "And when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross operating revenues within the State, including in their gross operating revenues within this State the equal mileage proportion within this State of their interstate business and deducting from their gross operating revenues the proportionate average of operating expenses or operating ratio for their whole business, as shown by the Interstate Commerce Commission Standard Classification of Accounts".

This statute has been construed and applied, and in this case was applied only to the interstate business partly transacted in North Carolina, and the mileage proportion has been applied only to such interstate traffic as lay partly within this State.

The Company made its returns for the years 1927, 1928, and 1929, but departed from the statutory method of ascertaining net income, in that it attempted to set up alleged actual costs or expenses of operation in North Carolina, and to deduct this from the averaged gross revenues allocated to North Carolina under the mileage prorate statute. It reported no taxable net income for these years.

The Commissioner of Revenue reviewed the returns, applied the statute and found a taxable net income for the years in question of $86,421.71, and assessed the tax accordingly. The Company filed a protest, and upon the overruling of this protest by the Commissioner paid the tax and appealed to the Superior Court of Wake County, where the matter was heard under the statutes of North Carolina applicable to the case. By the statutory designation, the State upon the relation of the Revenue Commissioner, was made plaintiff; but the defendant company was really the actor and plaintiff under the burden to establish its contention that the imposition of the tax and its incidence upon it was unconstitutional. The cause was referred to Hon. J. Crawford Biggs to take the evidence and to make and state his findings of fact and conclusions of law.

Upon the hearing before the Referee, evidence was introduced by the defendant company and by the State comprising most of the 835 pages of record which the præcipe of the plaintiff in error has required to be certified to this Court.

Upon the hearing before the Referee, numerous exceptions were taken to the admission of evidence, both on the part of the plaintiff and of the defendant. Later, upon review by the Superior Court, the defendant company did not bring to the attention of the trial judge, or insist upon a ruling as to any of this evidence. Therefore, he cannot do so on this appeal.

Wallace v. *Douglas,* 103 N. C. 19, 9 S. E. 453;
McNeill v. *Hodges,* 105 N. C. 52, 11 S. E. 265;
Baker v. *Edwards,* 176 N. C. 229, 97 S. E. 610.

The Referee found against the validity of the tax and made a report stating his findings of fact and conclusions of law. The findings were adverse to the State. To this

report the Commissioner of Revenue, in apt time, objected and excepted and moved to set aside the same and for a review thereof; the defendant company, this appellant, filed no objections or exceptions to the report.

The matter came on for a hearing before Hon. H. A. Grady, Presiding Judge of the Superior Court, at term, and a stipulation was entered between the parties that the Judge might hear and determine all questions pertaining to the matter with the same force and effect as might be done by a jury, which was waived.

Under the North Carolina law, practice and procedure, the Judge had the power in this case, regardless of such a stipulation, to review the findings of fact by the Referee, to set the findings aside, and to make findings of his own.

C. S. 578 (Michie's North Carolina Code, 1935);
Cummings v. *Swepson*, 124 N. C. 579, 32 S. E. 966;
Wallace v. *Benner*, 200 N. C. 124, 156 S. E. 795;
Thigpen v. *Farmer's Banking, etc. Co.*, 203 N. C. 291, 165 S. E. 720.

After hearing the argument, the Presiding Judge set aside the findings of fact and conclusions of law of the Referee and made his own findings of fact and conclusions of law, signed a judgment adverse to the defendant company, which appears in the record (R. p. 152).

The defendant company appealed to the Supreme Court of North Carolina, which reviewed the entire matter upon the exceptions filed, and rendered the opinion and the decision found in the record.

There is, Therefore, Nothing Now Presented to This Court Which Does Not Wholly Concern the Procedure in the North Carolina Court, Which Procedure Was in Strict Accordance with the Laws, Precedents and Practice of That Court and Consonant With the Requirements of Due Process of Law.

Referring now specifically to the Assignments of Error in the Petition for Appeal, which were brought forward by reference in the "Statement of Points Relied Upon," presented to this Court by the appellant, and dealing with them in the order presented:

I. In the court below the appellant at no time raised any point as to the constitutionality of the statute under which it was taxed upon its face, but only contended that its application to the appellant's business, and to its particular situation, produced an unconstitutional result and was confiscatory in its effect. If the appellant can come to this Court for review on a different theory, the statute, on inspection, will be found constitutional and fair on its face, and has been upheld by the Court in *Atlantic Coast Line* v. *Doughton*, 262 U. S. 413, 67 L. Ed. page 1051, and in associated cases to which this appellant was a party.

The criticism against the statute as being *per se* unconstitutional, is without merit. The statute does not assume that operating revenue or income will be uniform throughout the railroad system, or that costs of operation will be rigidly uniform throughout the system; but it does assume that there is a definite relation between costs and revenues which will be substantially uniform throughout the system; an assumption which is borne out by common experience and is abundantly sustained in the evidence in this case.

See references to evidence elsewhere.

Note the admission of witness Keeley (R. 778) for the company, that he had prepared for this appellant material justifying higher freight charges in North Carolina, on the theory that costs of operation were higher.

II. The question of unconstitutionality here is one of the application of the statute, not of anything inherent in it, or any fault *per se*. It sometimes occurs that an allocation statute, fair on its face and fitted to the situation of the great majority of taxpayers, may, in its application to a particular taxpayer, do an injustice. He is entitled to show its unconstitutional or confiscatory application to his business by proper evidence. It cannot be assumed that the statute is unconstitutional on its face, and as a matter of law, because the exceptional result produced in its application to such a taxpayer an unconstitutional result. That is the assertion made by this appellant.

This distinction is adhered to in this Court.

Atlantic Coast Line R. R. Co. v. *Doughton*, 262 U. S. 413, 67 L. Ed. 1051;

Hans Rees Sons v. *Maxwell*, 283 U. S. 123, 134, 75 L. Ed. 879;

Zucht v. *King*, 260 U. S. 174, 67 L. Ed. 194.

Appellant undertook to show in the court below that the taxing statute was not fairly applicable to his business, and his case rested upon proof of such fact. That the statute is considered generally fair and applicable to business such as is done by this appellant is borne out by the fact that none of the five or six great railway systems entering the State of North Carolina, and operating therein, have raised the question; at least not since the opinion of the Court in *Atlantic Coast Line Railway* v. *Doughton*, *supra*.

The record will not show that this question was raised in the Supreme Court of North Carolina, or that the Court

was asked to rule upon the statute as to its constitutionality, *per se.*

III. The Supreme Court of North Carolina is a court of review on matters of law. It cannot be said to adopt findings of law. It did pass upon the questions as to whether the findings of fact made before the court below were within the power of the trial court and according to the practice of the court and based upon proper evidence, and it found that they were.

(a) Such findings were not contrary to the admission of the State in the record, as claimed by appellant. The State made no admissions. Appellant apparently refers to the statement of Maxwell, Commissioner of Revenue, that in the return made by the Company it had correctly applied the mileage prorate formula and arrived at a correct result as to the averaged gross income produced by such application, and had correctly reported the same. The order in which this statement occurs is not in any sense a pleading, and even if it were, the Commissioner could not estop the State by such a declaration, if it had been his purpose so to do.

A reference to this order will show the objection is frivolous.

(b) The findings of fact objected to by this appellant were not unsupported by evidence. We repeat that this is merely an assertion not sufficient to invoke the jurisdiction of this Court, and call attention to the record.

The appellee briefly points out the following evidence in the record as sustaining the finding of fact that defendant's gross revenues compared to its operating expenses, were sufficient to produce the net income taxed, although appellee does not admit that it was necessary to produce such

evidence, as the burden in that respect rested wholly upon the defendant company.

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165.

Appellee refers to pages 462-609 of the record, where evidence is presented tending to show that prevailing transportation charges on freight actually moved in North Carolina, which is in Southern Territory, were much higher than on the system as a whole, almost all of which except its North Carolina branches lie in Official Territory, where lower rates prevail.

On pages 447-487 and 311 where the evidence tends to show that appellant is a "coal road," which commodity carries a very low rate, and that system traffic was about 80% coal, against North Carolina traffic containing only 50% coal, the rest being higher grade traffic carrying greater freight charges.

To page 372, where Conrad, appellant's witness, compiles figures and admits that North Carolina traffic showed a superiority in producing revenue over system traffic in actual earnings in the ratio of 141% per ton mile for North Carolina traffic, as compared with 100% system traffic.

To pages 587, et seq., where J. W. Roberts, a competent expert, who examined the books of the company for many weeks, makes a tabulated statement and gives testimony tending to show that the gross operating revenues of appellant in North Carolina were much in excess of the average result found by the mileage prorate method of the formula, and sufficiently greater than such operating cost to produce a greater net income than that taxed.

There is much other pertinent evidence in the same direction.

We wish to emphasize, however, that this appellant cannot be heard to say that the findings are unsupported by

evidence, *when the burden was upon this appellant in the court below to furnish evidence if it desired a finding of fact with regard to either operating costs, gross income or gross operating revenues or net taxable income, and it failed to introduce any evidence either as to gross operating revenues or as to net income.*

IV. The Supreme Court acted within its legitimate authority and according to the practice and procedure of the Court in the matters complained of under paragraph IV.

(a) The Judge of the Superior Court had the power to overrule the specific findings of the Referee upon objection to his report, and it is admitted that the Judge did so overrule these findings.

C. S. 578 (Michie's North Carolina Code, 1935);
Cummings v. *Swepson*, 124 N. C. 579, 32 S. E. 966;
Thigpen v. *Farmer's Banking, etc. Co.*, 203 N. C. 291, 165 S. E. 720.

It is not necessary that the Judge should follow the outline presented by the Referee, or use any particular method of dealing with the facts as suggested by the Referee's Report. He may follow a plan of his own, finding facts independently of the scheme set out by the Referee. The fact that the Referee has found a particular fact is of no significance upon review.

The procedure adopted by the trial judge in this respect has the authority of the statute and the decisions of the Court, and has been used immemorially.

(b) Such specific findings as the case demanded were made by the court below. It was not essential that the Court find anything but the controlling fact that upon the evidence the Company had not established that it had no taxable net income, or that it was substantially less than

that found by the statute. The Court did, upon competent evidence, find that it had such income.

The burden was upon defendant to show the contrary, anyway.

(c) While numerous objections were made before the Referee to the admission of evidence, the record discloses the fact that when the Referee's report came in, no objection to any evidence was insisted upon before Judge H. A. Grady, who had himself the power to find the facts. It is true in the record to the North Carolina Supreme Court this appellant attempted to make exceptions of that sort the basis of argument. A reference to the record, however, will show that the exceptions upon which it then relied were made to the Referee and not to Judge Grady. It was the duty of this appellant to have requested of the Trial Judge a ruling upon such testimony, which it did not do.

Wallace v. *Douglas,* 103 N. C. 19, 9 S. E. 453;
McNeill v. *Hodges,* 105 N. C. 52, 11 S. E. 265;
Baker v. *Edwards,* 176 N. C. 229, 97 S. E. 610.

At any rate, matters of evidence of this character form a part of the procedure in the court below, which procedure was directly approved by the Supreme Court, and the objection here raises no Federal question.

(d) The language employed by the Trial Judge in his judgment is sufficient to constitute findings of fact. The ground of the particular assignment under this head, however, is that the finding was not supported by evidence, and this appears to be based upon the contention that the evidence introduced was of actual gross operating revenues, and was in contradiction to the statutory formula for the ascertainment of the fact of gross income. It might be said to this that the evidence as to actual gross operating expenses attempted to be introduced was in contradiction to

the statutory formula for finding gross operating expenses. This theory has been dealt with by the Supreme Court, which held that the method of attempting to show gross operating revenue by relying upon the statutory ascertainment of averaged gross operating revenue, made solely for the purpose of a convenient method of assessing the tax and to be used in the other part of the allocation statute, was not available to the defendant company in this regard, and could not be used either to establish actual revenue on this trial or to bar the introduction of evidence relating to actual revenue. We submit that this is procedural in its character, but if it should be considered not wholly so, it is a correct interpretation of the law.

Summarizing briefly, the Court should not entertain the appeal because the appellant's cause rests in fact, which facts have been examined by a court of competent jurisdiction, and in so far as was necessary to determine the rights of this appellant the findings of the Court were supported by competent evidence. Such finding of fact disposed of the alleged charge of the exercise of authority repugnant to the Constitution, and according to the practice of the Court will not be reviewed.

New York v. *Roberts*, 171 U. S. 658, 19 S. Ct. 658.

The appellant in the court below failed to produce evidence necessary to maintain its contention that the result of the application of the statute taxed net income in North Carolina which it did not have, and cannot complain here of an adverse judgment.

The proceedings in the said Court were according to the provisions in that Court, and were consonant with due process of law. The complaint of appellant now is merely as to procedural matters before the original Referee, the Trial Judge and the North Carolina Supreme Court, and

being matters within the provisions of that Court to determine, and the procedure being consonant with due process of law, this Court will not review such proceedings.

For the reasons stated herein, appellee moves that this appeal be dismissed, or that the judgment of the court below be affirmed.

Respectfully submitted,

A. A. F. SEAWELL,
Attorney for Appellee.

APPENDIX.

Section 312, Chapter 80, Public Laws 1927.

The basis of ascertaining the net income of every corporation engaged in the business of operating a steam or electric railroad express service, telephone or telegraph business, or other form of public service, when such company is required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, shall be the "net operating income" of such corporation as shown by their records kept in accordance with that standard classification of accounts, when their business is wholly within this State, and when their business is in part within and in part without the State their net income within this State shall be ascertained by taking their gross "operating revenues" within this State, including in their gross "operating revenues" within this State the equal mileage proportion within this State of their interstate business and deducting from their gross "operating revenues" the proportionate average of "operating expenses," or "operating ratio," for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts. From the net operating income thus ascertained shall be deducted "uncollectible revenue," and taxes paid in this State for the income year, other than income taxes and the balance shall be deemed to be their net income taxable under this act. That in determining the taxable income of a corporation engaged in the business of operating a railroad under this section, in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this State, then said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

Section 312, Chapter ——, Public Laws of 1929, is identical with the foregoing.

SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 610.

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant,*

vs.

STATE OF NORTH CAROLINA *on Relations of* A. J. MAXWELL, *Commissioner of Revenue.*

To Norfolk and Western Railway Company, Appellant:

Now comes the State of North Carolina upon the relations of A. J. Maxwell, Commissioner of Revenue, Appellee, and upon the grounds set forth in their accompanying statement opposing the jurisdiction of this Court and stating matters or grounds making against such jurisdiction, the said appellee moves that this appeal be dismissed or that judgment of the court below be affirmed.

A. A. F. SEAWELL,
Counsel for Appellee.